

**BEFORE THE APPEALS BOARD  
FOR THE  
KANSAS DIVISION OF WORKERS COMPENSATION**

**SCOTT PATTERSON**

Claimant

VS.

**TURBINE ENGINE COMPONENTS TECHNOLOGY**

Respondent

AND

**PENNSYLVANIA MANUFACTURERS' ASSOCIATION**

Insurance Carrier

Docket No. 1,048,841

**ORDER**

Respondent requested review of the January 23, 2012 Award by Administrative Law Judge (ALJ) John D. Clark. The Board heard oral argument on May 16, 2012, in Wichita, Kansas.

**APPEARANCES**

Mitchell W. Rice, of Hutchinson, Kansas, appeared for the claimant. Douglas C. Hobbs, of Wichita, Kansas, appeared for respondent and its insurance carrier. Due to a conflict, Board Member Gary R. Terrill, has recused himself from this appeal. Accordingly, Jeffrey King, of Salina, Kansas, has been appointed to serve as a Board Member Pro Tem in this case.

**RECORD AND STIPULATIONS**

The Board has considered the record and adopted the stipulations listed in the Award. A Notice of Attorney Fee Lien was filed on March 30, 2011, by attorney Matthew L. Bretz. The ALJ failed to address the lien in the Award. At the oral argument to the Board it was agreed that the lien dispute should be remanded to the ALJ once the Board has determined the remaining issues in this matter.

### ISSUES

The ALJ found claimant to have a 17.50 percent whole body functional impairment based on a split of the opinions of board certified orthopedic surgeon, C. Reiff Brown, M.D., and board certified occupational medicine specialist, Allen J. Parmet, M.D.

Respondent requests review of the nature and extent of claimant's disability arguing that claimant is entitled to no more than a 10 percent whole body functional impairment based the opinion of Dr. Parmet. Respondent contends that Dr. Brown's opinion is not credible as he is an orthopaedist and does not treat and is not an expert in pulmonary conditions, and does not have the proper equipment to perform the requisite testing. And because Dr. Brown utilized the improper criteria from the *AMA Guides* to make his functional impairment rating.

Claimant argues that the ALJ's Award should be affirmed.

### FINDINGS OF FACT

Claimant's job for respondent was as a CMM programmer and operator. His duties were to program a CMM machine, a coordinate-measuring machine.

Claimant testified that on August 17, 2009, he was exposed to a fine wood dust or fiberglass dust when crews using a chainsaw removed a wall in order to remove a machine claimant was working on from the room he was working in. Claimant contends that if the crew had folded the machine down and removed it from the room without having to take out a wall, he would not have been exposed to the dust in the room. Claimant testified that he was in the dusty room for 10 minutes.

As claimant was leaving the room he felt like he had something caught in his throat. He eventually started hacking and vomited. He notified Steve Farley and told him that he needed to look at the room that claimant had been working in because he had gotten sick. Claimant did not go back into the room, but he continued to work the rest of the day.

Claimant was sent to the doctor on Tuesday, the 18th or Wednesday, the 19th. Claimant was allowed to return to work with restrictions. However, he got sick and had to take time off work. When he returned he was transferred from programming PCDMIS for the CMM to a clean environment, inspecting parts.

Claimant testified that a CMM is supposed to be in a clean environment free of dust and fumes with a maintained temperature of 68 degrees. Claimant testified that the only time he is exposed to fumes is when he is required to wipe down parts as part of his inspections. He wears a mask for this and when he is working in the building. Claimant is exposed to chemicals for about 30 minutes out of an 8 hour day.

Claimant denied having any prior pulmonary problems, other than a lingering cough he had for a month back in 2007, and for which he received treatment and was fine after.<sup>1</sup> Claimant testified that, currently, he coughs a lot when it is cool, damp or moist outside, or if he passes by someone who is smoking. Claimant is a non-smoker. His wife is a smoker, but does not smoke in the house. She does however smoke in the car, which aggravates the claimant's condition.

Claimant received treatment from Dr. Doornbos, who recommended that claimant see a gastroenterologist, and an ENT physician and get some therapy for his throat. Dr. Doornbos opined in his January 22, 2010 report that claimant's ongoing chronic cough was related to his workplace exposure to chemical irritants.

Claimant acknowledged that he contracted pneumonia in 2000, when he was putting in 16 to 18 hour days. One day claimant started running a fever and eventually he had to call in sick. Claimant sought medical attention and was given a prescription and sent home. Two days later he went back to the doctor and was given another prescription and by the end of the week he was in the hospital and was told that he had pneumonia. Claimant admitted to other past health issues including acid reflux and issues involving chest pain.

John Howard is an electrical maintenance technician and machine repairman for respondent. He has worked for respondent for 13 years. Mr. Howard testified that he was given a work order for August 17, 2009, to enlarge the overhead doorway of the building so that the Carthage Company could come in with a forklift, pick up the CMM machine and remove it from the building. The reason the doorway had to be enlarged is because the machine was too tall to fit through the existing doorway.

Mr. Howard testified that during the time he was disassembling the door he saw claimant and Bill Millington working at the CMM machine. He testified that claimant and Mr. Millington were aware of the project to enlarge the doorway and knew everything that went on that day. At one point the three discussed when the machine would be taken out. Mr. Howard could not recall if claimant was still in the room when the room was being cleared of debris. Mr. Howard testified that he doesn't recall the claimant leaving and there were only two ways out of the room, the left side door and the doorway which was being enlarged. Mr. Howard testified that the entire building was made out of compressed chip board and two-by-four studs inside the walls and pink insulation that you can buy at the lumbar yard.

Steven Weir, an electrical maintenance technician for respondent, testified that his job involves anything that has to do with maintaining the facility. He has worked for respondent for 32 years.

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<sup>1</sup> Claimant's Discovery Depo. at 55.

Mr. Weir testified that on August 17, 2009, he was the one who operated the forklift to transport the CMM machine out of the room. He also made sure that as the door was being enlarged contact with anything electrical was avoided.

Mr. Weir testified that when he arrived, claimant and Bill Millington were in the room. He didn't notice when the two left the room. He also admitted that he hadn't been looking for the claimant. He testified that everyone present knew what the job was and what was going to happen. He didn't notice when the cutting started or when they covered the CMM machine with a drop cloth to keep the debris off.

Mr. Weir testified that the sawing produced debris of sawdust and chips falling from the doorway, which left him covered head to toe. He did not report having any respiratory problems from the debris exposure. Mr. Weir testified that the dust was mainly confined to the area below the chainsaw.

William Millington, a machinist in the tooling department, has worked for respondent for 27 years. His job in August 2009 was as a quality inspector. Mr. Millington was working in the room with the claimant on August 17, 2009, on the CMM machine.

Mr. Millington testified that individuals from maintenance came in on August 17th to discuss the process of removing the doorway. He testified that there was an agreement that he and claimant would be notified when the crew was ready for them to leave the room.

Mr. Millington testified that there was a time when he had to leave for about 20 minutes to do an inspection and when he came back the room was empty. He had no idea where the claimant had gone and he was upset when he saw that the machine had debris on it. He reported the debris and someone cleaned the machine and then plastic was placed over the machine so that the sawing could commence. Mr. Millington saw claimant about 30 minutes later at which time claimant was coughing and had tears in his eyes. Mr. Millington testified that he was never exposed to any of the dust.

Shawn Hock, a former employee of respondent, testified that at the time of his employment he was as a quality lab technician, charged with overseeing and auditing the heat processes.

Mr. Hock testified that a CMM machine is a coordinate-measuring machine that performs computerized inspections. He testified that the purpose of the room the machine was in was to protect it from extreme temperatures, dust and coolant that gets disbursed. The room had its own heating and cooling system.

Mr. Hock testified that his part in the project, on August 17, 2009, was to deactivate and move the temperature monitoring device to the location that the CMM machine was being moved to. He doesn't recall if he spoke with the claimant that day.

Mr. Hock testified that most of the wall to the room was going to be cut away to allow a forklift in to move the machine. He testified that there were chunks of debris and dust falling from the chainsaw, but not enough to cause a problem.

Mr. Hock testified that he did not see claimant in the room while the chainsawing was going on. The only person he recalls seeing was Bill Millington. He later found out claimant was filing a workers compensation claim. He had a hard time connecting claimant's breathing problems with the amount of dust and debris he recalls seeing in the room.

Mr. Hock testified that he was leery of claimant's claim because he had previously worked with claimant at R&R Precision Machine from January 2001 to 2004 and claimant had a similar claim there about the condition of the air in the shop causing respiratory problems.

Claimant was examined by Ronald Davis, M.D., at Occumed Associates on August 19, 2009. Chest x-rays, spirometry tests and laboratory studies were performed. Claimant was assessed with fiberglass exposure. Claimant was treated with steroids and a Medrol Dose Pack. Claimant next saw Dr. Davis on August 26, 2009, at which time his symptoms had improved. He continued to report throat irritation and difficulty swallowing. A pulmonary consultation was recommended.

Claimant was examined by Daniel Doornbos, M.D., on September 24, 2009. Claimant reported shortness of breath, difficulty breathing and tightness in his chest. Pulmonary function studies demonstrated moderate ventilatory defect. Oxygen saturation was 95 percent. Claimant's nasal membranes were slightly irritated but his lungs were clear. Claimant was described as obese and was experiencing reflux. He was diagnosed with gastroesophageal reflux by Steve Scheufler, M.D., on September 29, 2009. Claimant was placed on prednisone and Zithromax. Later dextromethorphan and Tussionex were added to his medication list.

At the October 20, 2009 examination, claimant was diagnosed with gastroesophageal reflux, laryngeal irritation and laryngitis. He was doing better with less coughing and shortness of breath. On December 1, 2009, claimant reported good and bad days with hoarseness and cough. On January 24, 2010, claimant reported ongoing chronic coughing and laryngeal irritation. By March 27, 2010, claimant had worsened, reporting gastroesophageal reflux, laryngeal irritation, laryngitis and mild obstructive ventilatory defect. Claimant was wearing a protective mask at work. Dr. Doornbos felt that the chemicals claimant was exposed to were mostly irritants without inherent damage. By May 3, 2010, claimant's cough had essentially resolved and his oxygen saturation was 98 percent.

On May 10, 2010, claimant was examined by Timothy Smith, M.D., and was diagnosed with irritant-induced asthma or reactive airway dysfunction syndrome. Dr. Smith was not sure claimant had reached maximum medical improvement (MMI).

Claimant continues to see Dr. Timothy Smith, his authorized treating physician, every six months. Claimant is not working under any restrictions and has not been approached by management about the air quality in his work area.

Claimant did work wearing a respirator for a while, but was later told by Dr. Doornbos that he didn't need to wear it anymore. Claimant testified that he has three inhalers and takes medication for acid reflux. Claimant testified that he had the acid reflux problem before the incident, but the breathing problems are a result of the incident. On occasion claimant has to use his inhaler at work.

Claimant admits to having pneumonia in 2002, but doesn't recall being diagnosed with tracheitis in December 2001. Claimant testified that had he been treated properly, he would not have developed pneumonia.

Claimant met with Dr. C. Reiff Brown, a retired board certified orthopedic surgeon, for an IME on July 5, 2011, for evaluation of his respiratory difficulties and assignment of an impairment.

Dr. Brown examined claimant and did not find any acute pulmonary distress. Claimant did have a cough reflex after taking a deep breath. No pulmonary function tests were performed, but Dr. Brown found claimant to have ongoing dyspnea (difficulty breathing) with mild exertion with no obstruction of his air passages. This problem is ongoing despite medication, which claimant will need to continue on for the rest of his life. Dr. Brown opined that claimant should be allowed to continue receiving follow-up care with Dr. Smith.

Dr. Brown found claimant to be at MMI and assigned a 25 percent permanent partial impairment of function to the body as a whole, based upon the AMA Guides, 4<sup>th</sup> ed., Chapter 9, Table 5, Page 231. He felt claimant should avoid work that involves even mildly increased physical activity. He felt claimant could continue his current level of work activity without danger.

Table 5, page 231 of the AMA Guides, 4<sup>th</sup> ed, is labeled Classes of Air Passage Defects. When asked why he did not use table 8, page 162, Classes of Respiratory Impairment, Dr. Brown testified that he was not aware of that table in the Guides.

On cross examination, Dr. Brown acknowledged that he was not a pulmonologist and had no training in pulmonology. He was not aware of claimant's breathing and wheezing problems in 2001, with chest tightness and coughing. He was unaware that claimant was diagnosed with tracheitis in 2001, and bronchitis in 2003, or the fact claimant

was using inhalers in 2007. When Dr. Brown examined claimant on July 5, 2011, the doctor performed no pulmonary function testing. He did not perform the spirometry test and does not have the equipment in his office to conduct that test. He acknowledged that claimant's pulmonary function tests were grossly abnormal soon after the work incident but later had returned to normal.

At the request of respondent, claimant met with Dr. Allen Parmet on November 15, 2011, for an evaluation. Dr. Parmet stated in his report that claimant's job involves the evaluation and quality assurance for aluminum and titanium parts produced for various aircraft manufacturers and previously worked inside an environmentally controlled room. Pulmonary function studies performed on claimant were reported as normal.

Claimant reported to Dr. Parmet that on August 17, 2009, he was exposed to insulation and debris from a wall being cut and developed a sensation of a furball in the back of his throat which irritated him the point the sensation made him gag and he eventually vomited. He reported the incident to his supervisor. Claimant also developed a cough and was sent to Dr. Doornbos, a pulmonologist. Dr. Doornbos prescribed a number of medications and continued to monitor claimant's pulmonary functions.

Claimant reported that he was doing pretty decent with the medication. Claimant denied any previous breathing problems. He is a non-smoker.

Dr. Parmet examined claimant and opined that claimant has reactive airway disease secondary to moderate to severe gastroesophageal reflux (GERD). Claimant is considered medically obese with a BMI of 33 percent, which Dr. Parmet considered to be a factor in claimant's GERD. He opined that the reflux preexisted the August 17, 2009 injury. He also reported that claimant did not have the persistent cough and significant degrees of dyspnea on exertion until after the occupational exposure on August 17, 2009. Claimant's pulmonary functions studies were normal.

Dr. Parmet opined that had claimant's condition been fully controlled prior to the August 17, 2009 event, he likely would not have developed a further condition requiring pulmonary medications. He testified that based upon the AMA Guides, 4<sup>th</sup> ed, Chapter 5, Table 10, page 164 claimant would have no impairment. However, Dr. Parmet assigned claimant a 10 percent whole person impairment for asthma. He recommended that claimant continue his treatment with Dr. Smith.

Dr. Parmet was asked to review the medical report of Dr. Brown. He testified that Dr. Brown incorrectly used Chapter 9, Table 5, Page 231 of the Guides, because it covers the ear, nose and throat related structures, but does not govern pulmonary functions.

**PRINCIPLES OF LAW AND ANALYSIS**

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.<sup>2</sup>

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.<sup>3</sup>

In general, the question of whether the worsening of a claimant's preexisting condition is compensable as a new, separate and distinct accidental injury under workers compensation turns on whether the claimant's subsequent work activity aggravated, accelerated or intensified the underlying disease or affliction.<sup>4</sup>

It is apparent that claimant has suffered from respiratory problems in the past. However, the medical opinions of Dr. Brown and Dr. Parmet support claimant's allegations of a worsening of his breathing difficulties as the result of the incident on August 17, 2009 while working for respondent.

A conflict exists however, as to the percentage of impairment claimant suffered from that incident. Dr. Brown rated claimant at 25 percent to the whole body. While Dr. Parmet limited claimant's functional impairment to 10 percent of the whole person. This dispute centers around which section of the AMA Guides, 4<sup>th</sup> ed. would be appropriate to employ in this situation.

K.S.A. 44-510e states in part:

Functional impairment means the extent, expressed as a percentage, of the loss of a portion of the total physiological capabilities of the human body as established by competent medical evidence and based on the fourth edition of the American Medical Association Guides to the Evaluation of Permanent Impairment, if the impairment is contained therein.<sup>5</sup>

The Kansas Workers Compensation Act requires the use of the AMA Guides, 4<sup>th</sup> ed., which both doctors did. However, Dr. Brown and Dr. Parmet differ on which is the proper section and table of the Guides to be used for claimant's condition. While Dr.

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<sup>2</sup> K.S.A. 44-501 and K.S.A. 44-508(g).

<sup>3</sup> *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

<sup>4</sup> *Boutwell v. Domino's Pizza*, 25 Kan. App. 2d 110, 959 P.2d 469, *rev. denied* 265 Kan. 884 (1998).

<sup>5</sup> K.S.A. 44-510e(a).



Brown used Chapter 9, Table 5 on Page 231, a chapter that Dr. Parmet described as being the ear, nose and throat section, Dr. Parmet used Chapter 5, Table 10, Page 164, the section dealing with pulmonary functions. When deciding what weight is to be given these two experts opinions, it is significant that Dr. Brown was not even aware of the existence of the pulmonary function section in the Guides.

The Board finds that the opinion of Dr. Parmet is more persuasive, as he was provided with a more complete medical history than Dr. Brown and applied the more appropriate section of the Guides in this circumstance. The Board finds that claimant has suffered a 10 percent whole person functional impairment as the result of the accident on August 17, 2009. The Award of the ALJ will be modified accordingly.

### **CONCLUSIONS**

Having reviewed the entire evidentiary file contained herein, the Board finds the Award of the ALJ should be modified to award claimant a 10 percent whole person functional disability, based upon the opinion of Dr. Parmet. The Award of the ALJ is modified accordingly. In all other regards the Award is affirmed in so far as it does not contradict the findings and conclusions contained herein.

This matter will be remanded to the ALJ for a determination of the attorney lien dispute above discussed.

### **AWARD**

**WHEREFORE**, it is the finding, decision and order of the Board that the Award of Administrative Law Judge John D. Clark dated January 23, 2012, is modified to award claimant a 10 percent whole body functional disability, based upon the opinion of Dr. Parmet. In all other regards, the Award is affirmed in so far as it does not contradict the findings and conclusions contained herein. The matter is remanded to the ALJ for a determination of the attorney lien dispute above discussed.

Claimant is entitled to 41.50 weeks of permanent partial disability compensation at the rate of \$546.00 per week, totaling \$22,659.00. As of the date of this award, the entire amount is due and owing and ordered paid in one lump sum, minus any amounts previously paid.

**IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of June, 2012.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

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